IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7516 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2. To be referred to the Reporter or not ? NO

3. Whether their Lordships wish to see the fair copy of judgment? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge? NO

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BARKATALI @ RAJY @ CHIKIO @ BUMABUM @ KAMRUDDIN JIVANI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

NOTICE SERVED for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 13/02/98

ORAL JUDGEMENT

By this application under Article 226 of the

Constitution of India, the petitioner, who is the detenu calls in question the legality and validity of the order of detention dated 5th August 1997, passed by the Police Commissioner for the City of Ahmedabd invoking his powers under section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short, the Act) consequent upon which the petitioner has been arrested and at present kept under detention.

2 The Commissioner of Police, Ahmedabad, came to know that the petitioner was committing theft and several other criminal wrongs with the result the people were feeling insecured. He therefore perused the records available from different police stations, and knew that about 8 complaints were lodged against the petitioner with Vejalpur and Gomtipur Police Stations. All the complaints were relating to the offences of theft alleging that the petitioner committed the theft of autorickshaw or scooter and other vehicles. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner going berserk, unspeakable diabolism terrorising the society, and upsetting the public order as well as leading to anarchy, ordinary law was falling short and sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present,he is in custody.

3. On behalf of the petitioner, challenging the impugned order, it is submitted that the order in question is passed after a great delay, as a result, the continued detention is rendered illegal. There was no justification for the authority passing the detention order to withhold the particulars. exercising the privilege under Sec.9(2) of the Act. The detaining authority ought to have disclosed the particulars of the witnesses whose statements were recorded in support of the order passed. No doubt, under Section 9 of the Act, the authority has the privilege, not to disclose certain facts in the public interest but that is to be exercised judiciously, and not arbitrarily or capriciously so as to deprive the detenue of his right to make effective representation. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the order. The instances about the offences noted in the order were not sufficient to brand him the dangerous person, or to form a reasonable belief that maintenance of public order was

adversely affected. The statements recorded are vague and necessary particulars when wanting, the order is bad in law and is liable to be quashed.

4. Mr S.R. Divetia, the learned APP has vehemently refuted the allegations made, submitting that there is no delay on the part of the authority passing the order of detention, promptly order was passed and in the public interest, certain facts & particulars are withheld. One must not overlook the fact that the petitioner is a devilish and never misses the chance to retaliate heavily. It may be stated that both while addressing the court confined to the only point namely exercise of privilege. I will therefore deal with the same alone.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be

deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to withhold the particulars about the witnesses keeping their safety in mind. It is pertinent to note that no affidavit is filed by the authority passing the order explaining the circumstances which led him to exercise the discretion available under Sec.9(2) of the Act. When that is so, the Court is entitled to infer every thing against the authority passing the order and it can be assumed that for no good and just cause the particulars are suppressed with the result the petitioner did not get the opportunity to make an effective representation. It can also be said that without applying its mind privilege is exercised and so the subjective satisfaction is also vitiated. In view of the fact the continued detention is arbitrary and unconstitutional. The petition therefore

is required to be allowed and the impugned order is required to be set aside.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 5th August, 1997 by the Police Commissioner, Ahmedabad City, is hereby quashed and set aside. The petitioner-detenu is ordered to be set at liberty forth with, if not required for in any other case. Rule accordingly made absolute.

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(mohd)